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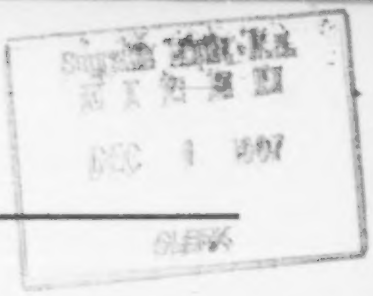

No. 97-568

In The

Supreme Court of the United States

October Term, 1997

JOHN H. HAPGOOD,

Petitioner,

vs.

CITY OF WARREN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio from the Eleventh Appellate District Ohio Court of Appeals for Trumbull County

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner, John H. Hapgood, was hired as a firefighter by Respondent, City of Warren (a municipal corporation), effective March 30, 1992. In January of 1993, Petitioner began experiencing back-related discomfort. In March of 1993, Petitioner was seen by one physician, and thereafter was seen by a second physician. As a result of these examinations, it was determined that Petitioner required back surgery. On May 13, 1993, Petitioner received a health insurance questionnaire asking whether or not the back condition in question was work-related. Petitioner responded on May 26, 1993, a few days after his surgery, that the back condition in question was not work-related.

Petitioner returned to work on June 4, 1993. Due to his physical disability he was assigned to "light duty". This "light duty" continued throughout the summer of 1993.

On September 27, 1993, Petitioner's "light duty" status was brought into question. Petitioner thereafter, on October 15, 1993, submitted an application for Workers' Compensation benefits. This claim stated that the aforementioned back problem of Petitioner was now work-related.

Following conferences and pre-disciplinary hearings, Petitioner was discharged from his employment with Respondent on December 7, 1993, for the falsification of his aforementioned Workers' Compensation claim.

After Petitioner's discharge, he filed a charge of discrimination against Respondent with the Ohio Civil Rights Commission. Within said charge Petitioner asserted that he was discharged contrary to state law in retaliation for having filed or pursued a Workers' Compensation claim against Respondent. The Ohio Civil Rights Commission, on December 15, 1994,

dismissed Petitioner's charge against Respondent, ruling that just cause existed for Petitioner's discharge. Thereafter Petitioner requested that the Ohio Civil Rights Commission reconsider its dismissal of his charge against Respondent, again asserting that he was discharged contrary to state law by Respondent in retaliation for having filed or pursued a Workers' Compensation claim. The Ohio Civil Rights Commission thereafter denied Petitioner's request for reconsideration.

At the time of Petitioner's discharge, there was in effect a collective bargaining agreement by and between Respondent and the bargaining agent for such employees as Petitioner (*i.e.*, International Association of Firefighters, Local No. 204). Said agreement was applicable to Petitioner. Said agreement expressly provided that no firefighter should be discharged except for just cause. That agreement also expressly provided that any firefighter desiring to contest the appropriateness of his discharge from employment must have that discharge reviewed through the grievance and arbitration provisions of said collective bargaining agreement. Said agreement also provided for final and binding arbitration for grievances thereunder by a neutral arbitrator.

After his discharge, Petitioner filed a grievance under the aforementioned collective bargaining agreement whereby he contested the justness of his discharge, arguing that he was not discharged for just cause. Petitioner's grievance culminated in final and binding arbitration before a neutral arbitrator. Throughout the arbitration process, Petitioner asserted that he was not discharged for just cause. During the arbitration process, Petitioner asserted no federal claims, argued no federal claims, and raised no issue relative to the federal Labor Management Relations Act of 1947, or any other federal law. During the arbitration process, a hearing was held at which Petitioner and Respondent both had an opportunity to present their respective

positions on the grievance, to offer evidence, to present witnesses, to cross-examine witnesses, and to brief the issues in writing. The neutral arbitrator, at the conclusion of the arbitration process, denied Petitioner's grievance, ruling that Petitioner was properly discharged for just cause.

After his discharge, Petitioner also filed an action in the Court of Common Pleas of Trumbull County, Ohio (hereinafter referred to as "the state trial court"). Within his Complaint before the state trial court, Petitioner set forth two causes of action. Petitioner alleged that his discharge resulted from "unlawful retaliation because of his pursuit of Workers' Compensation Claim", all allegedly "in violation of Ohio Revised Code Section 4123.90", and that his discharge resulted from intentionally tortious conduct on the part of Respondent, in violation of state law.

Before the state trial court, Petitioner asserted no federal claims, argued no federal claims, and raised no issue relative to the federal Labor Management Relations Act of 1947, or any other federal law. On October 13, 1995, the state trial court granted Respondent's motion for summary judgment upon principles of collateral estoppel.

During the pendency of the aforedescribed action before the state trial court, the United States Equal Employment Opportunity Commission also examined the merits of Petitioner's discharge. That agency independently examined the record presented before the Ohio Civil Rights Commission, and the findings of the Ohio Civil Rights Commission. During the pendency of the aforedescribed action before the state trial court (*i.e.*, on June 29, 1995) the United States Equal Employment Opportunity Commission likewise found that Petitioner was discharged by Respondent for just cause.

From the aforedescribed order of the state trial court granting summary judgment in favor of Respondent, Petitioner filed a Notice of Appeal with the Court of Appeals of the Eleventh Appellate District of Ohio (hereinafter referred to as "the state appellate court") on November 1, 1995. During this appeal process, Petitioner again argued that he was discharged by Respondent contrary to state law in retaliation for having filed or pursued a Workers' Compensation claim against Respondent. During this appeal process (as during the proceedings below in the state trial court) Petitioner asserted no federal claims, argued no federal claims, and raised no issue relative to the federal Labor Management Relations Act of 1947, or any other federal law.

On October 28, 1996, the state appellate court affirmed the summary judgment rendered by the state trial court below in favor of Respondent under principles of collateral estoppel.

From the aforedescribed decision of the state appellate court, Petitioner filed his Notice of Appeal and Memorandum in Support of Jurisdiction with the Ohio Supreme Court on December 12, 1996. In his Memorandum in Support of Jurisdiction, Petitioner again argued that his discharge was contrary to state law in that it resulted from unlawful retaliation for having filed his Workers' Compensation claim. Within his Memorandum in Support of Jurisdiction (as before the state trial court below and the state appellate court below) Petitioner asserted no federal claims, argued no federal claims, and raised no issue relative to the federal Labor Management Relations Act of 1947, or any other federal law. By entry filed on March 12, 1997, the Ohio Supreme Court declined jurisdiction to hear the case.

From that decision Petitioner filed his Petition for a Writ of Certiorari before this Honorable Court.

In review of this Statement of the Case, it should be said that the validity of Petitioner's discharge by Respondent has already been an issue seven different times before six different tribunals and courts — one state administrative agency (*i.e.*, The Ohio Civil Rights Commission — both originally and upon reconsideration); final and binding arbitration before a neutral arbitrator per collective bargaining agreement; one federal administrative agency (*i.e.*, the United States Equal Employment Opportunity Commission), and three state courts. None of the aforementioned tribunals have ever ruled that Petitioner was discharged for anything other than just cause.

REASONS FOR DENYING THE WRIT

The central theme of Petitioner within his Petition for a Writ of Certiorari is that his state claim for alleged retaliatory discharge for the filing of a state workers' compensation claim should still be pursuable in court even though a neutral arbitrator (per collective bargaining agreement) and a proper administrative agency found that said discharge was for just cause, all because that state claim is not pre-empted by the federal Labor Management Relations Act of 1947 (*i.e.*, 29 U.S.C. § 141 *et seq.*). Petitioner focuses in on the "pre-emption" vs. "non pre-emption" aspects of said federal Labor Management Relations Act of 1947.

Petitioner's reliance upon, and pursuit of, said federal Labor Management Relations Act of 1947 is not only misguided and not applicable (as hereafter discussed), but is sudden and untimely. Petitioner asserted no federal claims, raised no federal issues, and raised no issue relative to the federal Labor Management Relations Act of 1947 (or any other federal law) before any of the tribunals or state courts below. Petitioner's initial reliance upon, and initial pursuit of, the federal Labor Management Relations Act of 1947 within his pending Petition

for a Writ of Certiorari appear to be an effort on the part of Petitioner to fix some kind of federal connection to his case. No such federal connection exists. Throughout all of the proceedings, tribunals and courts below, state claims were being decided.

Even had Petitioner previously raised the specter of said federal Labor Management Relations Act of 1947, such was (and is) misguided as said act is not, and was not, applicable to Petitioner and the circumstances in question. At all times material to the case at bar (particularly the time of Petitioner's discharge by Respondent), Petitioner was an employee of a municipal corporation of the State of Ohio. The aforementioned Labor Management Relations Act, at 29 U.S.C. § 152(2) thereof, defines who is an "employer" for purposes of that Act. At all times material, said Section 152(2) expressly provided, and continues to provide, that the term "employer" for purposes of said Act "shall not include . . . . any State or political subdivision thereof . . ." In 1980, this Court ruled that state and local public employees are not subject to said Labor Management Relations Act of 1947. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

In light of the foregoing, the federal statute invoked by Petitioner in support of his Petition for a Writ of Certiorari herein (*i.e.*, the Labor Management Relations Act of 1947) clearly does not apply to Petitioner or the circumstances in question. All of the cases cited by Petitioner in his Petition for a Writ of Certiorari as being cases of other courts which purportedly conflict with the decision upon which Petitioner seeks his Writ of Certiorari involve employees and employers in the "private sector".

In light of the foregoing, Respondent submits that the question presented for review, and the proposed reasons for granting the writ, all as set forth by Petitioner in his Petition for a Writ of Certiorari, are untimely and faulty and rest upon

deficient factual and legal premises. In the case at bar, the tribunals and courts below did not decide "a federal question", let alone "an important federal question", let alone "an important federal question" which conflicts with an applicable decision of an applicable other court.

Even had "a federal question" or "an important federal question" been decided below, such was not in conflict with applicable decision(s) of this Court or the United States Court of Appeals for the Sixth Circuit. Subsequent to the case of *Lingle v. Norge Division, Magic Chef*, 486 U.S. 399 (1988) (which was extensively cited by Petitioner in his Petition for a Writ of Certiorari), this Court ruled that arbitration per collective bargaining agreement is an appropriate forum for the resolution of statutory rights, and that by agreeing to arbitrate a statutory claim a party submits to its resolution in an arbitral rather than a judicial forum. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Subsequent to the case of *Knafel v. Pepsi-Cola Bottlers*, 899 F.2d 1473 (6th Cir. Ohio 1990), (which was extensively cited by Petitioner in his Petition for a Writ of Certiorari), the United States Court of Appeals for the Sixth Circuit ruled that harassment/retaliation claims under statutes may be subject to mandatory arbitration per collective bargaining agreement. *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991).

CONCLUSION

In light of the foregoing, Respondent respectfully prays that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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